IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION
FAMILY COURT APPEAL NO.12 OF 2002

Monindarpalsinha N. Kochar,)
age 50 years, Occupation - Service,)
R/o.4/15, Anand Housing Society,)
Shankar Seth Road, Pune 37.).. Appellant

Versus

Jyotindar Kaur Mohindarpal N.Kochar,)
age 42, Occ: Business,)
R/o.Kalyan Sing Sahani,)
RB 11/1 Salunkhe Vihar,)
Kondhwa, Pune 38.).. Respondent

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Ms Neeta Karnik for the appellant.

Shri D.P.Guchiya for the respondent.

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CORAM : R.M.S.KHANDEPARKAR &

ANOOP V. MOHTA, JJ.

DATED : 20TH JUNE, 2005.

JUDGMENT : (PER R.M.S.KHANDEPARKAR, J)

1. Heard. This appeal arises from the judgment dated 26th November, 2000 passed by the Family Court, Pune, in Divorce Petition No.926 of 1995 filed by the appellant-husband against the respondent-wife. By the impugned judgment, the petition for divorce was dismissed while granting permanent alimony to the respondent at the rate of Rs.1,000/- per month. The

divorce was sought on the ground of desertion and cruelty comprised under Section 13(1)(ia)(ib) of the Hindu Marriage Act, 1955.

2. The marriage between the appellant and the respondent took place on 29th August, 1993. The respondent went to her parent's house on 24th December, 1993. On 22nd September, 1994, the respondent-wife filed petition for judicial separation being Petition No.656 of 1994. The respondent lodged complaint against the appellant and his parents under Section 498A of I.P.C., wherein, the appellant and his parents were arrested and prosecuted under the said provision of law in the Criminal Case No.356 of 1994. The fact regarding the complaint and arrest of the appellant and his parents was published in the newspapers - "Aaj Ka Anand" and "Sakal" on 27th September, 1994. The petition for judicial separation No.656 of 1994 came to be dismissed by the Family Court, Pune, by its Order dated 28th July, 1995. The appellant filed the petition for divorce being Petition No.926 of 1995 on 28th December, 1995 on the grounds stated above. After recording the evidence, the petition for divorce filed by the appellant came to be dismissed by the impugned judgment dated 26th November, 2000. The present appeal was filed on 2nd

February, 2001. During the pendency of this appeal, on 23rd December, 2002, the learned Magistrate disposed of the Criminal Case No.356 of 1994 and acquitted the parents of the appellant and convicted the appellant under Section 498A of the I.P.C. The matter carried in appeal by the appellant being Criminal Appeal No.29 of 2003, which came to be filed on 20th January, 2003, and the same was disposed of on 7th May, 2004 thereby acquitting the appellant. Meanwhile, the respondent had also filed the petition for maintenance of Rs.10,000/- per month and Rs.8 lakhs for purchasing a house, besides the petition for Stridhan being Petition No.7 of 2002, and they are stated to be pending before the Family Court, Pune.

3. It is the contention of the appellant that the respondent deserted the appellant and left the matrimonial house since 24th December, 1993 and proceeded to her parent’s house and she never returned to stay with the appellant. It is his further contention that the fact about desertion from 24th December, 1993 has been clearly admitted by the respondent in her testimony before the family Court in the proceedings for judicial separation filed by her and further the said fact has been confirmed in the judgment of the family Court while dismissing her

petition for judicial separation. It is his further contention that the family Court while dismissing the said petition for judicial separation has also arrived at the finding that the respondent is living separately from her husband without any justification and she had left the matrimonial house without any reasonable cause. It is his further case that the intention on the part of the respondent to desert the matrimonial house and the company of the appellant from 24th December, 1993 was clear at the time when she left the matrimonial house on the same day. The same was confirmed from the fact of filing of the proceedings for judicial separation as well as criminal complaint under Section 498A of I.P.C., coupled with the fact that the respondent exhibited adamant and uncooperative attitude in refusing to come back to reside with the appellant inspite of various attempts on the part of the appellant for reconciliation and to bring her to the house of the appellant. It is the further case of the appellant that during the time she stayed with the appellant, she always misbehaved and harassed the appellant and his family members and was insisting for a residential house separate from that of the parents of the appellant. According to the appellant, his parents are ill and need constant medical care, apart from the

fact that the appellant himself is a disabled person.

4. On the other hand, it is the case of the respondent that right from the day one she joined the appellant after the marriage, she was being illtreated and there was constant demand for Rs.1,00,000/- from the parents of the respondent to enable the appellant to purchase a car, and on account of refusal on the part of the respondent to pay the said amount to the appellant, the respondent was being harassed by one way or the other by the appellant and his parents. It is her further case that on 24th December, 1993 she was forced to leave the matrimonial house, and therefore, she had to proceed to live with her parents against her desire. It is the further case of the respondent that her attempt to stay with the appellant after the dismissal of the petition for judicial separation also proved futile on account of uncooperative attitude on the part of the appellant. It is her further case that considering the income of the appellant, the respondent is entitled for permanent alimony, and therefore, no fault can be found with the impugned judgment granting permanent alimony and dismissing the petition for divorce.

5. The family Court, Pune, after considering the

evidence on record, has held that the appellant had failed to establish that the respondent had treated the appellant with cruelty within the meaning of the said expression under Section 13(1)(ia) of the Hindu Marriage Act, 1955 as also failed to prove that the respondent had deserted him for the period not less than two years immediately preceding presentation of the petition without just reason or proper cause, as contemplated under Section 13(1)(ib) of the said Act, and therefore, there was no case for grant decree of of divorce, however, simultaneously granted permanent alimony of Rs.1,000/- per month to the respondent.

6. While assailing the impugned judgment as far as it dismisses the petition for divorce is concerned, the learned Advocate appearing for the appellant submitted that the fact that the respondent left the matrimonial house on 24th December, 1993 having been established by a clear finding of the family Court to that effect in the proceedings for judicial separation filed by the respondent herself and further the fact that the respondent had filed the proceedings for judicial separation, complaint under Section 498A of I.P.C. against the appellant and his parents and got them arrested and prosecuted, got the news about their arrest published in the newspapers and the fact that

she refused to come back to stay with the appellant inspite of various efforts on the part of the appellant in that regard, obviously establish desertion for a period of more than two years prior to the filing of the petition for divorce by the appellant and the Court below having totally failed to consider the same while rejecting the divorce petition had acted arbitrarily, rendering its judgment to be bad in law. The respondent has not shown any cause for leaving the matrimonial house on 24th December, 1993 as well as for not returning to reside with the appellant and the allegations regarding ill-treatment during the period she had stayed with the appellant as well as the alleged ground for leaving the matrimonial house from 24th December, 1993 have not been proved by the respondent. The intention on the part of the respondent not to return to reside with the appellant was clear on the day she left the matrimonial house and the same was confirmed from the fact of filing the petition for judicial separation, and further the fact that there was no reasonal cause for leaving matrimonial house on 24th December, 1993 and further confirmed with the clear finding in that regard by the family Court in its judgment while dismissing the proceedings for judicial separation and since there was no appeal against the said judgment, it had

attained finality for all purposes. The appellant having clearly established with cogent evidence about the factum of desertion of the matrimonial house by the respondent from 24th December, 1993, he has a clear case for divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. As regards the ground of cruelty, the learned Advocate for the appellant submitted that apart from the fact of filing of the false complaint, which has been abundantly established by the fact of dismissal of the complaint and acquittal of the appellant as well as his parents, there was humiliation to the appellant on account of arrest and detention in the police custody and publication of the news in that regard in the newspapers, and that was all on account of a false complaint by the respondent which clearly disclosed mental cruelty to the appellant warranting dissolution of the marriage, as contemplated under Section 13(1)(ib) of the Hindu Marriage Act, 1955. It is further submitted that refusal to participate in the Chulah ceremony, which is a prestigious ceremony consequent to the marriage in the community of the appellant, a strange conduct on the part of the respondent, harassment caused by her to the appellant and his parents, abruptly leaving the matrimonial house without any justifiable cause and refusal to

return to reside with the appellant, disclose cruelty on the part of the respondent to the appellant, and therefore, the Court below ought to have decreed the suit for divorce on the said ground also. The learned Advocate for the appellant further submitted that the evidence placed on record as regards the income of the appellant, financial obligations and the expenses incurred by the appellant on account of ill-health of his parents as well as for his own medical expenditure clearly reveal that there was no justification for grant of permanent alimony in favour of the respondent, and certainly not to the extent of Rs.1,000/- per month.

7. Reliance is sought to be placed in the decisions in the matter of **Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi,** reported in (2002)1 SCC 308, of **Sadhana Satish Kolvankar v. Satish Sachidanand Kolvankar,** reported in 2005(2) Bom.C.R.340, **G.V.N.Kameswara Rao v. G.Jabilli,** reported in (2002)2 SCC 296, **Smt.Kalpana Srivastava v. Surendra Nath Srivastava,** reported in AIR 1985 Allahabad 253, and **Rajkishore Prasad v. Smt. Raj Kumari Devi & Ors.,** reported in AIR 1986 Patna 362.

8. The learned Advocate appearing for the

respondent, on the other hand, has submitted that there has been absolutely no evidence led by the appellant that the respondent had left the matrimonial house of her own and, on the contrary, the testimony of the respondent discloses that the respondent had not left the matrimonial house of her own but rather she was forced to leave the matrimonial house and was not taken inside the house after having driven her out of the house. That apart, even after the dismissal of the petition for judicial separation, she had made honest effort to go back to reside with the appellant but due to the adamant and uncooperative attitude on the part of the appellant, she was prohibited from residing in her matrimonial house. The learned Advocate for the respondent further submitted that there was absolutely no evidence on the point of desertion of the matrimonial house by the respondent and certainly not even after the dismissal of the petition for judicial separation, and therefore, no case was made out by the appellant for grant of divorce on the same ground. As regards the cruelty is concerned, the learned Advocate for the respondent submitted that there being absolutely no evidence led by the appellant, no fault can be found with the dismissal of the petition for divorce on the said ground. As regards the Chulah ceremony is concerned,

apart from mere allegation in that regard, no evidence has been led so also in relation to the alleged conduct of harassment by the respondent. It is a mere word against word and there is no evidence led by the appellant though the burden was purely on him. He has further submitted that the impugned order was passed on 26th November, 2000 when the criminal case filed under Section 498A of the I.P.C. was not at all disposed of, and therefore, there was no occasion for the family Court to arrive at a conclusion that the complaint was false. Being so, for not giving any credence to the contention on the part of the appellant about the complaint being false, no fault can be found with the impugned judgment. The decision regarding acquittal of the appellant and his parents from the said complaint being not forming part of the evidence on record before the family Court, it would not be appropriate to interfere in the impugned judgment on the ground of such acquittal subsequent to the passing of the impugned judgment. Considering the monthly income of Rs.10,000/- of the appellant, according to the learned Advocate for the respondent, no fault can be found with the direction for permanent alimony of Rs.1,000/- per month issued by the family Court. Merely because some sundry expenses had to be incurred for the treatment of the parents of the

appellant, that would not be a justification to deny permanent alimony to the respondent.

9. Considering the rival contentions of the learned Advocates on behalf of both the parties, and on perusal of the records, the following points arise for our determination:-

1. Whether the appellant has established that the respondent had deserted the matrimonial house and the appellant over a period of two years prior to the filing of the petition without any justifiable reason or proper cause, and therefore, warrants decree of divorce under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955?

2. Whether the appellant has established cruelty by the respondent to the appellant within the meaning of the said expression under Section 13(1)(ia) of the Hindu Marriage Act, 1955, and therefore, warrants dissolution of the marriage by divorce under the said provisions of law ?

3. Whether the materials on record justify the grant of permanent alimony in favour of the respondent to the extent of Rs.1,000/- per month ?

10. Perusal of the materials on record reveals that the conduct of the respondent consistently discloses that she was never interested in returning to the matrimonial house after she had left the same on 23rd December, 1993. The finding arrived at by the Family Court regarding attempt on the part of the respondent to prevent the marriage being broken up is not only contrary to the materials on record but it is totally perverse. It discloses total misreading of the evidence on record. The finding regarding harassment to the respondent by the appellant is also not based on any material on record. Before arriving at any such finding, the Family Court has not taken pains to refer to any incident of harassment to the respondent. The Family Court also erred in totally ignoring the clear admission on the part of the respondent that she had never gone to the matrimonial house after December, 1994. There was a clear statement to that effect in the proceedings for judicial separation and the same was confirmed in the

present proceedings. In fact, the Family Court does not appear to have understood the concept of cruelty at all. The issue regarding cruelty has been answered in the negative holding that the appellant has not proved any act on the part of the respondent amounting to cruelty. In fact, the cruelty pleaded and established is not a physical cruelty but it relates to the conduct of the respondent which amounted to mental torture to the appellant.

11. As regards the point of desertion is concerned, undisputedly, the respondent proceeded to her parent's house from the matrimonial house on 24th December, 1993 and thereafter, she did not return to reside with the appellant. Besides, while she continued to reside with her parents, she filed petition for judicial separation being Petition No.656 of 1994 on 22nd September, 1994. The said petition was followed by the criminal complaint dated 25th September, 1994 against the appellant and his parents i.e. in-laws of the respondent. It is undisputed fact that consequent to the said complaint under Section 498A of I.P.C., the appellant was arrested. It was only after the dismissal of the said petition for judicial separation i.e. on 28th July, 1995, that the respondent claimed to have approached the

appellant for settlement.

12. As regards the claim of settlement is concerned, there is not even a statement that she of her own went to her matrimonial house on 29th July, 1995. On the contrary, a categorical statement in her testimony is that she was brought to her matrimonial house by her brother. It is, however, pertinent to note that neither the brother nor any other witness was examined in support of the said contention. Undisputedly, the allegation in that regard has been denied by the appellant. Added to this, there were categorical admissions on the part of the respondent to the effect that "Since 1996 December myself and opponent had not resided together at any time", and further that "I have not given any offer to the Petitioner that I wanted to reside with me." In addition, she has also stated that "it is true that I am ready for decree of divorce if all my golden ornaments and articles are given to me by the Petitioner and the expenses incurred by me in respect of maintenance and marriage expenses."

13. It is well settled principle of law that the point regarding desertion is to be decided on the basis of the inference to be drawn from the facts

brought on record. Neither brother of the respondent nor any other person has been examined in order to establish the claim regarding attempt on the part of the respondent for reconciliation after disposal of the petition for judicial separation. That apart, the very fact that the respondent after having left the matrimonial house on 24th December, 1993 did not return to the said house till the filing of the petition for judicial separation or any time thereafter, and further filing of the petition for judicial separation discloses her clear intention to desert the appellant and the matrimonial house right from the time when she left the matrimonial house, i.e. on 24th December, 1993. This inference from the evidence on record is inevitable in view of above referred facts which also finds support from the further acts on the part of the respondent whereby after filing of the petition for judicial separation, the respondent also filed a criminal complaint under Section 498A of I.P.C., consequent to which the appellant was arrested. It is also undisputed fact that the said complaint was ultimately dismissed and the appellant was acquitted by the learned Magistrate. This being an appeal, which is a continuation of the original proceedings, relevant facts which have occurred subsequent to the disposal of the proceedings

before the Lower Court cannot be ignored and merely because the order of acquittal has been delivered after the disposal of the proceedings before the Lower Court, the benefit thereof cannot be denied to the appellant. In the facts and circumstances of the case, therefore, it is apparent that the criminal complaint filed against the appellant could not be established by the appellant. Evidently, the allegations against the appellant were not established to be true.

14. The evidence regarding leaving of the matrimonial house on 24th December, 1993 and filing of the petition for judicial separation in the month of September, 1994 followed by the criminal complaint, which came to be dismissed subsequently, obviously disclose on one hand desertion of the appellant and the matrimonial house by the respondent and on the other hand causing of mental cruelty to the appellant by the respondent.

15. The Apex Court in **Kameswara Rao's case (supra)** had clearly held that filing of the false police complaint results in loss of reputation and standing in society at the instance of one's spouse, and that amount to mental cruelty and the traumatic experience

which the husband had to undergo on account of the allegations which could not be proved certainly results in mental cruelty to the husband by the wife.

16. The Supreme Court in **V.Bhagat v. D.Bhagat, [(1994)1 SCC 337]** has clearly held that "the mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each

case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

17. The Apex Court in **Adhyatma Bhattar Alwar's case (supra)** has held that :-

> ""Desertion" in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are:
>
> 1. the factum of separation;
>
> 2. the intention to bring cohabitation permanently to an end- animus deserendi;
>
> 3. the element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period;
>
> The clause lays down the rule that desertion

to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include "wilful neglect" of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary

intention aforesaid. The petition for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period."

18. In **Smt.Kalpana Srivastava's case (supra)**, the Allahabad High Court had held that cruelty is not confined to physical cruelty, but includes mental cruelty. In **Rajkishore Prasad's case (supra)**, the Patna High Court had held that wife leaving her matrimonial home without any reason or without being driven out and staying separately for two years clearly justifies decree of divorce.

19. Bearing in mind the law laid down by the Apex Court, it is apparent from the materials on record in the case in hand that after leaving the matrimonial house on 24th December, 1993, there was absolutely no attempt on the part of the respondent to reconcile with the appellant or to return to the matrimonial house. Added to this, in September, 1994, she proceeded to file proceedings for judicial separation which obviously disclosed that she was no more interested in joining the appellant and she wanted to disassociate herself from the appellant. The intention as well as action in pursuance of the said

intention to desert the appellant and the matrimonial house was therefore very clear from the conduct of the respondent revealed from the day of leaving the matrimonial house i.e. on 24th December, 1993. None of the allegations in the criminal complaint against the appellant and his parents could be established by the respondent and they were acquitted. The parties to the proceedings are educated persons. The filing of the criminal complaint subsequent to the petition for judicial separation obviously disclosed further intention on the part of the respondent to pressurise the appellant to agree for separation, as rightly contended by the learned Advocate appearing for the appellant. The conduct of the respondent, therefore, leaves no room for doubt but to conclude that the same clearly establishes desertion of the appellant for more than two years prior to the filing of the petition for divorce as well as mental cruelty to the appellant.

20. The evidence on record also discloses the attitude on the part of the respondent which was of non-cooperation prior to the day of her leaving matrimonial house. Having agreed to marry with the appellant and to reside with him in his house, it was obvious for the appellant to expect the respondent to

follow certain traditions and customs which are followed consequent to the marriage in the family of the appellant but the respondent having refused to participate and cooperate in performing such traditions and customs, it obviously disclosed not only un-cooperative and adamant attitude on the part of the respondent but also caused dissatisfaction to the appellant and thereby being responsible for creating unhappy situation and in the process, if the displeasure was expressed by the appellant, he could not have been blamed. Being so, some minor incidents of quarrels which might have taken place prior to the leaving of the matrimonial house, by no stretch of imagination, could be said to be a sufficient cause for the wife to leave the matrimonial house, and if the cause was a creation of the acts on the part of the respondent herself, she cannot seek to derive any benefit out of the result of such acts to justify the factum of leaving of the matrimonial house on 23rd December, 1993.

21. The learned Single Judge of Punjab and Haryana High Court in **Girdhari Lal v. Santosh Kumari,** reported in (1982)1 D.M.C. 180, had held that filing of a false complaint would amount to cruelty. The Division Bench of this Court in **Sadhana Satish**

Kolvankar's case (supra) while rejecting the contention that filing of the complaint under Section 498A of I.P.C. should not be given much importance as the said decision had delivered after the disposal of the petition by the Trial Court and during the pendency of the appeal, held that "all material which is logically probative for a prudent mind cannot be excluded from consideration while arriving at a decision. There cannot be any allergy to look into such material, provided it has a reasonable nexus and credibility. The essence of judicial approach is objectivity, exclusion of extraneous matters from consideration and observance of rules of natural justice. In our view, on these tests, the respondent cannot be denied the opportunity to rely upon this order." Indeed, the order of acquittal of the appellant though has been delivered subsequent to the decision by the trial Court, the same cannot be ignored, as already held above, as the same obviously relevant while dealing with the allegation of cruelty and defence sought to be raised in that regard by the respondent.

22. For the reasons stated above, therefore, it cannot be said that the appellant had failed to discharge his burden to establish the ingredients of

the grounds for desertion and cruelty for the purpose of divorce.. The point Nos.1 and 2 framed above are therefore answered in affirmative.

23. As far as granting alimony is concerned, taking into consideration the amount of alimony being Rs.1,000/-, no doubt, finds it to be either unreasonable or exhorbitant and hence no interference is called for, in that regard. The point No.3 is therefore answered in negative.

24. For the reasons stated above, therefore, the Appeal partly succeeds. The impugned judgment of dismissal of petition for divorce is hereby quashed and set aside. The petition filed by the appellant for dissolution of the marriage on the ground of desertion and cruelty is to be allowed and accordingly is hereby allowed. The order of grant of permanent alimony of Rs.1,000/- to the respondent is, however, not interfered with. There shall be no order as to costs.

(Anoop V.Mohta, J) **(R.M.S.Khandeparkar, J)**